Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1945.

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4-24-45—200

No. 1219

In the Supreme Court of the United States

October Term, 1943

[redacted]

v.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT

BRIEF FOR THE UNITED STATES [redacted]

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645352—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1210

MINOLA TAMESA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 57–59) has not yet been reported. The memorandum opinion of the district court (R. 12–19) is reported at 55 F. Supp. 928, *sub nom. Fujii* v. *United States.*

JURISDICTION

Petitioner and sixty-two others, including one Shigeru Fujii, whose cases were consolidated for trial in the district court, appealed to the circuit court of appeals from their convictions. The appellants other than Fujii stipulated in that court "that when judgment is entered in the case of [*Fujii*

v. *United States*], and said judgment becomes final that the same judgment shall then be entered in the sixty-two (62) other cases above numbered" (R. 1–2). Judgment was entered in the *Fujii* case March 12, 1945 (R. 59). No petition to this Court for a writ of certiorari was made in his case.

On March 27 judgment was entered and the mandate issued in each of the other sixty-two cases, including petitioner's (R. 59–60). On April 17, 1945, Circuit Judge Phillips entered an order denying petitioner's motion to recall the mandate, on the ground that in the *Fujii* case the time to file a petition for rehearing in the circuit court of appeals and for filing a petition for a writ of certiorari in this Court had expired (R. 60–61). Judge Phillips apparently was of the view that the provisions of the stipulation for the entry of judgments in the remaining 62 cases when the "judgment becomes final" in the *Fujii* case, contemplated that the *Fujii* case would be litigated to a final conclusion and that the judgments in those 62 cases would be the same as the judgment finally entered in that case. However, petitioner urges, in effect (Pet. 5), that the stipulation had reference only to the proceedings in the circuit court of appeals and was not intended to waive his right to seek review of his case in this Court. Since his petition was filed April 27, within thirty days after judgment was actually entered in his case, petitioner contends that it is

timely. We believe that the stipulation is ambiguous and may be open to the construction which petitioner urges. In these circumstances we do not challenge the timeliness of the petition.

QUESTION PRESENTED

Whether a citizen of Japanese descent who is detained in a relocation center is subject to compulsory military training and service under the Selective Training and Service Act of 1940.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and the Selective Service Regulations are set forth in the Appendix, *infra,* pp. 12–15.

STATEMENT

Petitioner and sixty-two other persons of Japanese ancestry assigned to the Heart Mountain Relocation Center were convicted in the United States District Court for the District of Wyoming for violation of the Selective Training and Service Act. The specific charge against petitioner was that he knowingly failed to comply with an order of his local board directing him to report for a pre-induction physical examination (see R. 3–4).[1] On consent of the defendants

[1] The only record in the circuit court of appeals was the record in the *Fujii* case and that record, together with the proceedings in the circuit court of appeals, constitutes the record on this petition. Since petitioner's case and *Fujii's* are identical in all pertinent respects there would appear to be no reason why the petition may not be considered on the basis of the record in the *Fujii* case.

their cases were consolidated and tried before a judge without a jury (R. 7). Each was convicted and sentenced to imprisonment for three years (R. 20).[2] Upon appeal to the Circuit Court of Appeals for the Tenth Circuit (see pp. 1–2, *supra*) the judgment was affirmed (R. 57–60).

The pertinent facts, as to which there was a stipulation between the parties (R. 27–55), may be briefly summarized as follows:

Petitioner is a native born citizen of Japanese ancestry who was transferred by the military forces from the Pacific Coast military area to the Heart Mountain Relocation Center in Wyoming. He registered with his local board under the Selective Training and Service Act, and subsequent to December 7, 1941, he was classified 4–C.[3] Thereafter the Army designated petitioner as a person of Japanese ancestry who was acceptable for service and he was thereupon classified

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[2] These sentences are subject to the special parole provisions contained in Section 10 (a) (6) of the Selective Training and Service Act (50 U. S. C. App. 310 (a) (6)) and Executive Order 8641 (6 Fed. Reg. 563), pursuant to which the Attorney General is authorized to parole any person convicted for violation of the act, either to the armed forces or to a Civilian Public Service Camp.

[3] This classification includes a person who "because of his ancestry is, under procedure prescribed by the Director of Selective Service, found by the land or naval forces to be unacceptable for training and service or by the Director of Selective Service to be unacceptable for work of national importance under civilian direction." Selective Service Regulation 622.43 (*infra*, pp. 14–15).

I–A (available for military service). The local board to which petitioner's file had been transferred ordered him to appear for a pre-induction physical examination. Petitioner received the order, but he refused to comply with it, principally on the ground that he was being deprived of his constitutional rights by being detained in a relocation center. (R. 27–29.)

In respect of the relation of petitioner's detention in the Heart Mountain Relocation Center to his ability to comply with the local board's order, the Assistant Director of the center testified that the center authorities cooperated with the local board; that transportation was available to petitioner to enable him to comply with the board's order; and that there were no restrictions imposed upon petitioner by the center authorities which prohibited him from performing his duty. The Assistant Director testified further that more than five hundred persons assigned to the center had been inducted into the Army. (R. 37–39, 40.)

ARGUMENT

1. It is undisputed that petitioner registered under the Selective Training and Service Act, that in the course of the selective process he was ordered by his local board to report for a pre-induction physical examination, and that he wilfully refused to comply with that order. Nor does petitioner contend that his detention in the relocation center operated in any manner to pre-

vent him from complying with the board's order. The sole basis for petitioner's attack on the judgment of conviction is that because of his detention in the Heart Mountain Relocation Center he is not subject to compulsory military training and service under the Selective Training and Service Act. He argues (Pet. 14–17) that Congress did not intend that a person detained in a relocation center should be inducted into the armed forces, but he points to nothing in the Act or its legislative history or in the Selective Service Regulations which supports his contention.

Passing for the moment the question of the possible application of the doctrine of *Falbo* v. *United States*, 320 U. S. 549, to petitioner's asserted defense, we think it abundantly clear that as a citizen of the United States who was required by Section 2 of the Act (*infra*, p. 12; see R. 27) to register with his local board, petitioner is subject to military training and service and that the fact that he was detained in a relocation center does not relieve him of that duty. Section 3 of the Act, as amended, expressly provides that, "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States." Nothing in Section 5, which enumerates those persons who are not re-

quired to register or who are deferred or exempted from military service, furnishes any basis for concluding that petitioner was relieved of his duty to submit to military training and service by virtue of his detention in the relocation center. The Selective Service Regulations contemplate that certain persons may be unacceptable to the armed forces because of their allegiance to other nations (section 622.43, *infra*, p. 14) and provide that those persons shall be classified IV–C, the classification given petitioner until he was designated by the armed forces as acceptable for military training and service. But nothing in the regulations indicates that a citizen of draft age who is acceptable to the armed forces shall be deferred or exempted from military service for the reason which petitioner urges.

Petitioner's argument is that it is unfair to compel a person who has not been accorded equality of treatment with other citizens to defend the country which is discriminating against him, and that Congress would not have intended that the Act be construed to accomplish such a result. As we have seen, nothing in the Act supports this conclusion. In answer to petitoner's contention the court below appropriately declared (R. 58):

> Under the admitted facts as to his loyalty, he was restrained of his liberty by confinement in the relocation center. He could have secured his complete release

> from restraint by writ of habeas corpus at any time and could thus have been restored to freedom. This would have given him the vindication which he seeks. It would have cleared his name for all time. But this he did not do. Instead, he chose to disobey a lawful order because he claimed his rights had been invaded. Two wrongs never make a right. One may not refuse to heed a lawful call of his government merely because in another way it may have injured him. Appellant was a citizen of the United States. He owed the same military service to his country that any other citizen did. Neither the fact that he was of Japanese ancestry nor the fact that his constitutional rights may have been invaded by sending him to a relocation center cancel this debt.

2. In support of his contention, petitioner relies (Pet. 7, 15–17) upon the decision of the District Court for the Northern District of California in *United States* v. *Kuwabara*, 56 F. Supp. 716, in which an indictment similar to the one under which he was convicted was quashed on the ground that the defendant was detained in the Tule Lake Relocation Center. It was the view of the court in that case that it was unconscionable to require military service of persons detained in relocation centers and that because of his detention Kuwabara was not a free agent. In so far as the propriety of requiring military service of persons in petitioner's position is con-

cerned, we submit that the question is solely one of legislative discretion, and that in the absence of a statutory exemption from service it is as much the duty of the Director of Selective Service to accomplish their induction into the armed forces as it is to select persons otherwise situated for military service. Regardless of what the facts may have been in the *Kuwabara* case, it is plain that in this case petitioner's detention did not interfere in any manner with his ability to comply with the order of his local board or with his ability to defend himself in this proceeding. The court below (R. 59) concluded that the *Kuwabara* case was distinguishable on its facts from this case. We submit, in addition, that for the reasons which we have set forth the *Kuwabara* decision is untenable.

Petitioner makes much of the failure of the Government to appeal from the district court's decision in the *Kuwabara* case, and of the alleged resulting difference in treatment between persons in the district containing the Tule Lake Relocation Center and elsewhere. But the Tule Lake Center is limited to persons, such as Kuwabara, who were disloyal to the United States and thus unacceptable for military service. After the institution of the Kuwabara prosecution it was ascertained from the armed forces that the defendants involved had been mistakenly designated as acceptable. In these circumstances there was

no occasion further to enforce the Selective Training and Service Act against those persons, and for that reason the Government did not appeal the *Kuwabara* decision.

3. Both courts below (R. 58, 19) properly held that under the doctrine of the *Falbo* case (320 U. S. 549) petitioner may not challenge his classification in a criminal proceeding. Petitioner's claim (p. 9, 18) that the *Falbo* case is inapplicable because the Selective Service Board had no "jurisdiction" over him is untenable. The argument that petitioner should not have been classified in I–A because Congress did not intend the Act to reach persons in his situation is no more jurisdictional than the contention in the *Falbo* case that the Board was required by the Act to classify Falbo as a minister.[4]

Furthermore, it would appear that petitioner has not exhausted the administrative remedies available to him. The order which he disobeyed merely required him to report for a physical examination. At that stage of the process he could not know whether or not he would be inducted. And the record does not indicate that he appealed from his I–A classification in the manner permitted by Selective Service regulations.

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[4] Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1945.